United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7202

IN THE

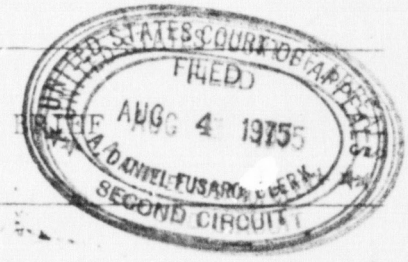
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B
P/S

No. 75-7202

ANNIE TYSON, ET AL.,	:	Appeal from the United States District Court for the District of Connecticut
PLAINTIFFS-APPELLEES	:	
V.	:	July 31, 1975
EDWARD W. MAHER, COMMISSIONER OF THE STATE OF CONNECTICUT DEPARTMENT OF SOCIAL SERVICES, ET AL.,	:	The Honorable M. Joseph Blumenfeld District Judge
DEFENDANT-APPELLANT	:	



DEFENDANT-COMMISSIONER'S REPLY BRIEF

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District Court Action Taken Subsequent To Judgement.

On April 1, 1974, in compliance with the District Court's order, the defendant-Commissioner submitted a "Full Participation Plan" to the District Court. The District Court approved the regulations submitted by the Commissioner in the Plan in compliance with Section I (b)(1), III, and V(b) of the court's order of February 24, 1975.

However, the District Court stated in the said Order of April 7, 1975, (a copy of which is attached hereto as Appendix A) that the regulation submitted by defendants in compliance with Section VI of the Court's order "is approved with amendment. The third to last paragraph of that regulation shall be amended to read:

> "In situations in which no household representative is able to visit the district office location because of sickness, injury, lack of transportation or the presence of pre-school or other persons in the home requiring care, an application for the replacement of a lost, stolen or mutilated ATP card may be made by a telephone call to the

district office and in those situations, a new ATP card shall be immediately mailed to the household upon such application.

"This amendment is necessary to ensure that the mailing of emergency ATP cards to such homebound households not be conditioned upon prior receipt of an affidavit or mutiliated card by the district office. However, this court shall entertain the submission for its approval of a supplementaty proposed regulation by the defendants directed to the problem of minimizing fraud in such situations."

Proceedings In the U. S. Court of Appeals.

On June 24, 1975, oral argument was held before the Court of Appeals on the defendant-Commissioner's Motion for Supersedeas. That Motion was denied but it was thereupon further ordered, inter alia, that "the State of Connecticut has the right to require affidavits from applicants for lost cards before a replacement card is issued."

As noted previously, the defendant-Commissioner is appealing in this case from only two portions of the District Court's judgement entered on February 27, 1975. Those two portions are:

> (1) The requirement that the Commissioner conduct the federally-mandated interview, prior to certification of eligibility for food stamps, "under a wider range of circumstances than currently allowed, including situations in which no household representative is able to visit the district office or circuit-riding location because of sickness, injury, lack of transportation or the presence of preschool or other persons in the home requiring care." [A.170]
>
> (2) The requirement that the Commissioner permit application for emergency and immediate replacement of ATP cards that are lost, stolen, mutilated or not mailed through administrative error under the same hardship circumstances detailed in paragraph (1), above. [A.179].

No Case or Controversy Was Before The District Court.

Despite the assertions of the plaintiffs to the contrary [Plaintiffs' brief, pp. 3-4], not a single plaintiff claimed to be aggrieved, or presented any evidence that he or she was aggrieved, either because such a plantiff was, in fact, unable to (1) visit the district office or circuit-riding location because of sickness, injury, lack of transportation or the presence of pre-school or other persons in the home requiring care,[1] or (2) because such a plaintiff had been unable to apply for emergency and/or immediate replacement of an ATP card which had been lost, stolen, mutilated or not mailed through administrative error[2] because of sickness, injury, lack of transportation or the presence of pre-school or other persons in

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[1] A careful reading of the affidavits of Burgess [A.15] and Pierson [A.17] will disclose that these plaintiffs did not claim they were unable to travel to a circuit-riding outpost office to be interviewed. In fact, they did so travel to an outpost office and were interviewed.

Their claims were that because they were either unable or unwilling to travel to a district office where an immediate application could be made, the processing of their application was delayed.

[2] A single plaintiff, Ethel Williams, claimed that her ATP card had been "rendered unusable" because she had

in the home requiring care.

Therefore, the Commissioner believes it was error for the District Court to order such relief since, as to these two issues, no "case or controversy" was presented to the District Court within the meaning of Article III of the Constitution. Professor Moore has stated that: "[T]he declatory [judgment] action is not a vehicle for the rendition of advisory opinions, nor for the entertainment of moot, hypothetical, or political questions. The fact that the action is prophylactic in character does not detract from the necessity of adverse parties with adverse legal interests. Moore's Federal Practice, Second Edition (1974), Vol. 6A, ¶57.11, pp. 57-80, 57-87, [footnotes omitted].

And as the late Chief Justic Hughes stated in a discussion of the "case or controversy" requirement:

> "A 'controversy' in this sense must be one that is appropriate for judicial determination...

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failed to receive her assistance check from the Welfare Department, and consequently did not have the money to purchase the food stamps. The District Court ruled that the emergency and/or immediate replacement regulations did not apply to such a situation [A.163].

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot...The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests...It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguised from an opinion advising what the law would be on a hypothetical state of facts..." Aetna Life Ins. Co. V. Haworth, 300 U.S. 227 (1937). [emphasis supplied]

Since, then, as to the issues presented by this appeal, there was no "case or controversy" before it, the District Court should not have passed judgment upon the interview requirement or the manner in which replacement of lost or stolen ATP cards was made.

State Administrative Procedures Which Impede Or Prohibit Eligible Persons From Participating In The Food Stamp Program Are Not Involved In This Appeal.

The plaintiffs-appellees have stated in their brief that one of the issues presented by this appeal is whether state administrative procedures which impede or prohibit eligible persons from participating in the food stamp program violate rights guaranteed by federal law.

If the plaintiffs mean that the state agency cannot adopt procedures which are not authorized by federal laws and regulations, and which impede or prohibit eligible persons, whether in hardship circumstances or not, from participating in the food stamp program, then of course the defendant-Commissioner readily agrees with this proposition. But that is not the issue in this case.

If, on the other hand, the plaintiffs mean that the defendant-Commissioner, by adopting and implementing administrative procedures which are authorized and required by federal laws and regulations, is impeding or prohibiting eligible persons from participating in the food stamp

program, then, that conclusion must be rejected out of hand. Such a claim by plaintiffs would really amount to an unstated charge that the federal regulations and/or federal statutes were themselves invalid. The District Court made no such finding in this action.

Plaintiffs have stated [plaintiffs' brief, p. 14] that the defendant-Commissioner's reliance on cases such as Udall v. Tallman, 380 U.S. 1 (1965), in support of the proposition that an administrative agency's interpretation of a federal statute is entitled to great weight,... "is misplaced because in this case U.S.D.A. provided nothing more than a restatement of the regulation and instruction, and the cases do not support giving special weight to an interpretation of federal law by a state agency." The defendant-Commissioner agrees that a state agency's interpretation of a federal statute is not entitled to such deference. But, once again, that is not the issue in this case. The Commissioner is not relying upon the state agency's interpretation--he is relying on the federal agency's (U.S.D.A.'s) interpretation of the statute.

Again in plaintiffs' brief [pp. 14-15] it is stated:

"[I]n both its [amicus] brief and letter,

> U.S.D.A. declined to further define the term 'unable'. U.S.D.A. did not give its opinion on whether the Welfare Department's practice was in compliance with these requirements, and urged the District Court to make the ultimate determination, stating "[t]he effectiveness with which the state agency is meeting the cited program requirements is a proper matter for the Court's consideration."

By referring to both the amicus brief and the U.S.D.A. letter in combination rather than separately, the conclusion of the plaintiffs that "U.S.D.A....urged the District Court to make the ultimate determination..." as to how the word "unable" is to be interpreted is misleading.

It is true that in its reply to an inquiry from the Commissioner, that U.S.D.A. stated, inter alia, in its letter of November 5, 1974:

> "In relation to determining what is sufficient justification for applicant inability to be interviewed in the office, there are no ground rules governing what is sufficient and what is not. Each case must be considered separately and judged by the individual

circumstances." [A.100]. [emphasis supplied].

As for the amicus brief of U.S.D.A., there was no discussion whatsoever therein about the word "unable" as it applied to the conducting of the pre-certification interview by telephone. The only mention of the pre-certification interview was in p. 4 of the amicus brief (A. 86) and was as follows:

> "The regulation which requires an interview (7 CFR 271.4 (a)(2)(ii)) also provides that FNS may waive the requirement where quality control demonstrates the effectiveness of the certification system. It should be noted, however, that no state has requested release from the interview requirement and, to date, quality control statistics have not indicated a level of effectiveness which would encourage FNS to grant such a request."

In its conclusion to its amicus brief, U.S.D.A. stated [A.90] in the final sentence thereof that:

> "[T]he effectiveness with which the state agency is meeting the cited program requirements is a proper matter for the

Court's consideration."

The defendant-Commissioner does not dispute this statement. But this is not, as the plaintiffs' brief would have us believe, an invitation to, and an urging of, the District Court to make the ultimate determination as to what was meant by the word "unable" as used in Handbook Sec. 2122, supra.

U.S.D.A. regulation §271.4 (a)(ii) [Addendum to defendants' brief, p. A-1] provides that the mandatory pre-certification interview may be conducted

> "...with the applicant or his authorized representative in a personal contact in the office, in a home visit, or by a telephone call..."

But Sec. 2122 of FNS (FS) Instruction 732-1, The Food Stamp Handbook, [Addendum to defendants' brief, p. D-1] makes it clear that the three methods of conducting the interview are not to be used interchangeably at the option of either the state agency and/or the applicant. That Section provides that:

> "It is necessary to interview all NA

> and SSI applicants including those whose applications are submitted by mail. Only qualified EW (See 2021) shall interview the applicant who may be the head of the household, the spouse, or the household's authorized representative. Applicants who are unable to come into the office for a face-to-face interview may be interviewed in a home visit or by telephone..."

This section then goes on to indicate that only in unusual circumstances is the state agency not to require the face-to-face interview in the office, by further providing:

> "When it is necessary to interview the applicant by telephone, the justification for such action must be fully documented in the case file. Inconvenience to the applicant is not considered sufficient justification..." [emphasis supplied].

Handbook, Sec. 2131 [Addendum to defendants' brief, p. E-1] further emphasizes the very limited circumstances

in which the telephone interview is to be employed when it provides:

> "Where it is impossible for the head of the household or the spouse to make application for participation, a responsible household member may be designated as the authorized representative. If household members are unable to make application because of employment, or health or transportation problems, etc., a responsible adult outside the household may be designated... [I]t is important that the head of the household or the spouse prepare or review the application whenever possible, even though the authorized representative will actually be interviewed." [emphasis supplied].

The great importance which U.S.D.A. attached to the interview prior to certification of eligibility is further indicated by another provision of Handbook, Sec. 2122, supra, which provides, inter alia,:

> "The purpose of the interview is to

> establish, to the satisfaction of the EW, [eligibility worker], that the actual facts of the case are consistent with the statements on the application concerning household income and circumstances and to establish, subject to subsequent verification, whether or not the household is eligible for food stamp assistance. The only successful method of making such a determination is the use of investigative interview techniques to conduct a thorough and searching inquiry into household circumstances..."
>
> Handbook, Sec. 2122, [Addendum to defendants' brief, p. D-1].

Needless to say, it is far more difficult, if not impossible, to conduct such an interview by telephone than in a face-to-face meeting with the applicant.

As further evidence of the continuing importance which U.S.D.A. attaches to the pre-certification interview, the defendants , at the suggestion of the District Court and

during the pendency of the litigation, inquired of U.S.D.A. as to whether it had any intention of discontinuing the requirement of an interview of the applicant prior to certification.[3]

The reply from U.S.D.A. [A.100] was that "...there are no plans to abolish the provision requiring that all NA and SSI applicants be interviewed to establish eligibility for food stamp assistance."

It is true that the District Court stated in its memorandum of decision [A.130] that:

> "The defendants have admittedly adopted a far more restrictive policy than that allowed by the federal regulations and instructions. Telephone interviews are conducted under no circumstances and home interviews are conducted only where the applicant is elderly, housebound and living alone. Thus, persons like plaintiffs Thomas Burgess or Jayne Pierson, who are unable to travel to certification offices for interviews

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[3] U.S.D.A. regulation 271.4(a)(2)(ii) contains the parenthetical observation that "...(the interview requirement will be continued until quality control demonstrates to FNS the effectiveness of the forms and certification system)..." 40 Fed. Reg. 1890 (January 9, 1975) [Addendum to defendants' brief, p. A-1].

> because of illness or injury, are not interviewed by telephone or at home, even though federal regulations would permit it. Similarly, no provision is made for individuals with pre-school children at home or those living considerable distances from certification offices with no available public or private transportation."

It is important to point out that the defendant's policy was "admittedly more restrictive than that allowed by the federal regulations" in one sense only. That is that in situations where an applicant was unable to travel to either a district, sub-district, or "outpost" office to be interviewed, a welfare worker would make a home visit to conduct the interview. In these situations, the Commissioner would be permitted, under federal regulations, to conduct such an interview by telephone, but he did not. Instead, a personal home visit was made. No evidence was presented at the trial of any housebound person living alone, or any other applicant unable to travel to a district office, who was not interviewed by a welfare worker in a home visit.

As for the observation of the trial court that "Similarly, no provision is made for individuals with pre-school children at home or those living considerable distances from certification offices with no available transportation."[A.131], it

is true that it was not department policy to conduct the interview by telephone. Under federal regulations, in such situations, it would be proper to conduct the required interview by telephone only if it could first be determined that:

1) no other responsible member of the household could be interviewed at a department office;

2) no "authorized representative" was available to be interviewed in the applicant's stead;

3) the applicant was actually unable to be interviewed at a department office or "outpost."

In short, under federal regulations, inconvenience to the applicant is not considered sufficient justification to waive the requirement of a face-to-face interview. Handbook, Section 2122 [Addendum to Defendants' Brief, p. D-1]. If the eligibility worker is satisfied that it is not merely inconvenient for the applicant to be interviewed in a department office, but that the applicant is, in fact, unable to be so interviewed, then a home visit or a telephone interview may be held. What the federal regulations are designed to avoid is sweeping definitions of large categories of persons defined as "unable" to be interviewed. As the U.S.D.A. letter to the Commissioner [A.100] concluded in response to an inquiry as to what constitutes sufficient justification for applicant inability to be interviewed in the office:

"Each case must be considered separately and judged by individual circumstances."

From the foregoing discussion, it is apparent that U.S.D.A. did not attempt to define with great precision the situations in which an applicant would be deemed "unable" to be interviewed in an office visit. It did not do so because it could not - each case was to be considered separately and judged by the individual circumstances.

But it is clear that the federal agency intended that the face-to-face interview was to be dispensed with in favor of a telephone interview only in unusual circumstances. Inconvenience to the applicant was not a sufficient justification. The state agency was to exercise an administrative discretion in making the determination.

The District Court's order, by prescribing in detail, broad categories of situations where the state agency must conduct the interview by telephone, has improperly subverted the U.S.D.A.'s overall scheme for determining food stamp eligibility, and has deprived the state agency of the flexibility necessary to administer such a vast program.

Defendants Policy Concerning The Issuance of Replacement ATP Cards Which Are Lost Or Stolen.

As stated in the Commissioner's original brief, the federal regulation dealing with the replacement of a lost or stolen ATP card is contained in FNS (FS) Instruction 734-2, Rev. 2, Oct. 1, 1974 [Addendum to defendants' brief, pp.- F-1 through F-4]. This regulation requires, inter alia, that before issuing a replacement ATP card for one reported lost, stolen or undelivered in the mail, the state agency is required to have the recipient sign an affidavit which must be filed in the case record. The testimony on this point was heard by the District Court in either late June or early July, 1974, before the U.S.D.A. had issued the revised regulation 734-2, supra. It is true, as the plaintiffs contend, [plaintiffs brief, p. 27] that the revised Instruction 734-2, supra, was never presented to the District Court. However, it is also true that there was no testimony or other evidence submitted by any of the plaintiffs that they ever were or had been aggrieved by a failure of the department to replace a lost or stolen card. Consequently, when the decision of the District Court was handed down on

February 25, 1975, the relief which the District Court ordered with respect to the replacement of lost or stolen ATP cards came as a complete surprise to the defendant-Commissioner, since, as discussed supra, there was no "case or controversy" presented to the District Court on this issue. And, in fact, the District Court stated in its Memorandum of Decision that: "Although the defendants are currently operating an emergency issuance procedure which substantially complies with Instruction 734-2 (VI) (C), the failure to issue written instructions...violates Food Stamp Reg. §271.4 (a)(8)..."[A.162] [emphasis supplied].

But this situation demonstrates graphically one reason why a federal district court should not undertake to prescribe the content of federal regulations. Had the decision of the District Court been rendered prior to the U.S.D.A. revision, the Commissioner could not subsequently (as he now cannot do) abide by the federal agency's revised regulation. He would have to petition the District Court for a modification of its existing order, in order to abide by the revised federal regulation. In the meantime, the Commissioner

would be out of compliance with a valid federal regulation,[4] and the District Court is then acting as a super-administrator of the food stamp program in this area, a role the District Court was never intended to assume.

The defendant-Commissioner, with respect to the issue of replacement of lost or stolen cards is presently in this very dilemma. The District Court has ordered him [See Appendix A hereto] to issue replacement ATP cards to recipients who have had them lost or stolen, and who are in "hardship circumstances" without requiring that such persons first execute an affidavit as required by the federal regulation. Every time he does so violates a valid federal regulation; every time he did not do so, he would be in defiance of a federal district court order.

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[4] The Commissioner was fearful of such a situation at the commencement of this action and, in an effort to avoid such a dilemma, moved to join the Secretary of Agriculture as a necessary party pursuant to Rule 19, F.R.C.P. Initially, the District Court granted defendants' motion without hearing, but subsequently, after plaintiffs' objection thereto, the Motion was Denied [R-31, R-32].

Conclusion

For the foregoing reasons, this Court should vacate those portions of the District Court's orders dealing with the conducting of the pre-certification interview by telephone or in a home visit, and with the replacement of ATP cards which are lost, stolen, mutilated or not mailed through administrative error, which portions are continued at page 2 of the Judgment [A.176] and p. 5 of the Judgment [A.179] respectively; and this Court should enter an order, with respect to these two issues, which would allow and require the defendants to comply with federal law and federal regulations.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

U.S. DISTRICT COURT

DISTRICT OF CONNECTICUT HARTFORD

ANITA TISDA, ET AL	:	
v.	:	CIVIL NO. H-74-95
NICHOLAS NORTON, Individually and as Commissioner of the State of Connecticut Welfare Department, ET AL	:	

O R D E R

1. The regulations submitted by the defendants in compliance with Sections 1(b)(1), III, and 7(b) of this court's order of February 24, 1975 are hereby approved.

2. The regulation submitted by the defendants in compliance with Section VI of the court's order of February 24, 1975 is approved with amendment. The third to last paragraph of that regulation shall be amended to read:

> In situations in which no household representative is able to visit the district office location because of sickness, injury, lack of transportation or the presence of pre-school or other persons in the home requiring care, an application for the replacement of a lost, stolen or mutilated AFP card may be made by a telephone call to the district office and in those situations, a new AFP card shall be immediately mailed to the household upon such application.

This amendment is necessary to ensure that the mailing of emergency AFP cards to such homebound households not be conditioned upon prior receipt of an affidavit or mutilated card by the district office. However, this court shall entertain the substitution for its approval of a supplementary proposed

APPENDIX A

regulation by the defendants directed to the problem of minimizing fraud in such situations.

3. The defendants shall take steps to ensure the most expeditious official adoption of these regulations, including their immediate submission to the Food and Nutrition Service for approval and promulgation as emergency regulations pursuant to Conn. Gen. Stat. Ann. § 4-168(b) (Supp. 1975).

It is

SO ORDERED.

Dated at Hartford, Connecticut, this 7th day of April, 1975.

H. Joseph Blumenfeld

H. Joseph Blumenfeld
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANNIE TYSON, ET AL	:	
V.	:	CIVIL NO. H-74-95
EDWARD W. MAHER, SUCCESSOR,	:	
COMMISSIONER OF SOCIAL SERVICES,	:	
STATE OF CONNECTICUT	:	

CERTIFICATION

I hereby certify that on the 1st day of August, 1975, I served two copies of the defendants' Reply Brief by depositing it in the mails to the following:

Attorney Marilyn Katz, Bridgeport Legal Services, 412 East Main Street, Bridgeport, Connecticut

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